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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 149

J. C. BURRIS, *Petitioner,*

v.

STATE OF TEXAS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered in the above-entitled case on March 16, 1955.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas (R. 132) is reported in 276 S.W. 2d 260, and is printed in the Appendix hereto. The opinion of that court overruling petitioner's first motion for rehearing (R. 153) is reported in 276 S.W. 2d 265, and is printed in the Appendix hereto. The order of that

court overruling petitioner's second motion for rehearing (R. 168) is reported in 276 S.W. 2d 260, and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on December 15, 1954 (R. 140). The first motion for rehearing was overruled on February 16, 1955 (R. 161). The second motion for rehearing was overruled on March 16, 1955 (R. 168). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

The federal issues necessarily were raised for the first time in petitioner's second motion for rehearing addressed to the Court of Criminal Appeals of Texas, which motion is part of the certified record before this Court (R. 162). These issues appeared for the first time in the opinion of that court dated February 16, 1955, overruling petitioner's first motion for rehearing, and could not have been anticipated by the petitioner at an earlier stage. The second motion for rehearing which raised these federal issues was denied without opinion. Under these circumstances, this Court has jurisdiction to consider the federal issues. See *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 673, 677-678.

QUESTION PRESENTED

Whether, in a prosecution for murder, the due process clause of the Fourteenth Amendment of the United States is violated by the arbitrary refusal of a state appellate court to consider the merits of a motion for a new trial which had been entertained and denied

by the trial court and which involved the right of the defendant to a fair and impartial trial by a fair and impartial jury.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the due process clause of the Fourteenth Amendment of the Constitution of the United States, providing that no State shall deprive any person of "life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was indicted and tried in the District Court of San Patricio County, Texas, for the crime of murder, it being alleged that he did "voluntarily and with malice aforethought kill W. F. Edwards, by shooting him with a gun." (R. 4). The victim was the police chief of the town of Taft, Texas. Rejecting petitioner's plea of self-defense, the jury found him guilty as charged and assessed his punishment at imprisonment for life (R. 31).

On March 19, 1954, four days after the rendition of the verdict, petitioner's then counsel filed a motion for a new trial, alleging merely that the verdict was contrary to the law and the evidence (R. 32). On April 16, 1954, new counsel for the petitioner filed a "first amended motion for a new trial" (R. 34), alleging in pertinent part that the jury, after retiring to reach a verdict, considered new and additional evidence which had not been introduced during the trial and which was prejudicial to the petitioner (R. 35). The State moved to strike this amended motion on the grounds that it had not been filed within twenty days after the filing of the original motion on March 19 and that

leave of court had not been obtained to file the amended motion after the twenty-day period (R. 41).[1]

On May 5, 1954, a hearing was held before the trial court on the amended motion. At that time the State added to its objections the fact that the amended motion had not been sworn to by petitioner and was unaccompanied by an affidavit of some member of the jury attesting to the alleged misconduct during deliberations. In response to this objection, petitioner's counsel offered testimony to the effect that the official court reporter had been unable to prepare the memoranda of exceptions on which the amended motion was based until April 14 and that the motion was prepared immediately thereafter and filed on April 16. It also appeared that the petitioner had been removed from the San Patricio County jail to a jail in another county prior to April 16 and was not returned until May 5; for that reason it was argued that petitioner's verification could not be secured on the motion prior to filing (R. 70). At the hearing on May 5, the court refused to permit the petitioner to file an affidavit

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[1] Reference was made in this respect to Article 755 of the Code of Criminal Procedure of Texas: "A motion for new trial shall be filed within 10 days after conviction as evidenced by the verdict of the jury, and may be amended by leave of the Court at any time before it is acted on within 20 days after it is filed. Such motion shall be presented to the Court within 10 days after the filing of the original or amended motion, and shall be determined by the Court within 20 days after the filing of the original or amended motion, but for good cause shown the time for filing or amending may be extended by the Court, but shall not delay the filing of the record on appeal."

Testimony offered by petitioner's counsel at the May 5 hearing, however, indicated that the trial judge had been informed prior to April 16 that an amended motion would be filed and that the judge had agreed to hear the motion as soon as convenient. (R. 70, pp. 18-39 of transcript of May 5 hearing.)

verifying the amended motion since it would constitute an amendment to that motion.[2]

Overruling the State's objections to the filing of the amended motion for a new trial, the trial judge permitted petitioner's counsel to introduce evidence in support of the contention that the jury had considered matters which had not been introduced at the trial. Ten of the jurors testified in person and all of them admitted that they had discussed petitioner's sentence in relation to eligibility for parole, it being the conclusion of the jury that a life sentence was necessary in order to keep petitioner from getting a parole. Only after that conclusion was reached did the jury vote to assess the life sentence. Admittedly no instruction from the judge had permitted the jury to speculate about the relationship of the sentence to the possibility of parole. (See pp. 122-216 of transcript of May 5 hearing.) At the conclusion of this uncontroverted testimony,[3] the trial judge overruled the amended motion for a new trial (R. 56).

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[2] At this hearing, petitioner's counsel also sought to file a verified amendment or addition to the amended motion for a new trial (R. 43). In pertinent part, this amendment was concerned with the allegation that an important prosecution witness at the trial had given false testimony at the instigation of another person. Having learned of this fact only on the day of the hearing, May 5, petitioner's counsel immediately secured a subpoena to compel the attendance of this important witness. But despite the fact that several deputy sheriffs were available to serve the subpoena, it was not served. And counsel was refused a continuance of an hour to produce the witness himself and was likewise refused a writ of attachment. (pp. 104-112 of transcript of May 5 hearing.) In short, the Court refused to compel the attendance and testimony of this witness.

[3] The State had introduced affidavits from all twelve jurors which recited in general terms that the jury had heard or discussed no evidence "except that which came from the witness

On appeal, the Court of Criminal Appeals held that the amended motion for a new trial was unauthorized since it was not verified and had been filed without leave of court more than twenty days after the verdict. (R. 136). At the same time it reviewed the evidence submitted at the hearing on the amended motion and concluded that the trial judge was justified in overruling the motion and that the jurors' discussion of the possibility of parole did not constitute misconduct. But in its opinion overruling the first motion for rehearing (R. 153), the Court of Criminal Appeals expressly discarded as "unnecessary" that portion of its original opinion discussing the alleged jury misconduct and returned to its first position that the amended motion was improper since it was "in general terms and not supported by the affidavit of anyone." At this point it became clear for the first time that the Court of Criminal Appeals was refusing to entertain the merits of the amended motion for a new trial despite the fact that the trial court had overruled all technical objections and had considered the motion on its merits.

Theretofore it had been the uniform rule in Texas that the entertaining of a motion for a new trial was a discretionary matter on the part of the trial court and that if in fact the trial court did entertain such a motion despite technical or procedural deficiencies the Court of Criminal Appeals would presume that good cause for such action had been shown and would review the action on its merits. See *Arsola* v. *State,* 133 S.W. 2d 585 (Tex. Cr. App.); *Hart* v. *State,* 17

stand." (R. 48-60). But these affidavits did not discuss or controvert the sworn oral testimony of ten of the jurors that the question of parole was discussed during their deliberations and was a factor in assessing the sentence at life imprisonment.

S.W. 421 (Tex. Cr. App.). But, as emphasized by the dissenting opinion of Judge Davidson (R. 157), the Court of Criminal Appeals, in its opinion overruling the first motion for rehearing, arbitrarily abandoned this well-established rule in this case. It held that the failure to verify the motion for a new trial and to accompany it with affidavits by one or more jurors invalidated the motion despite the action of the trial court in entertaining the motion on its merits. Only after this ruling had been made was it possible to raise any federal constitutional questions inherent in such an arbitrary decision.

The petitioner immediately raised such federal questions at the first available opportunity—in his second motion for rehearing (R. 163). In that motion petitioner alleged (R. 166) that it was a denial of due process of law, in violation both of the Texas Constitution and of the Fourteenth Amendment of the United States Constitution, "for the Court of Criminal Appeals to refuse to consider the undisputed testimony of the jurors showing jury misconduct prejudicial to appellant (petitioner), which deprived appellant (petitioner) of a fair and impartial trial by a fair and impartial jury, on the ground that the motion for a new trial alleged jury misconduct in general terms and was not supported by the affidavit of a juror or anyone having knowledge of the facts." The court in overruling without opinion this second motion for rehearing necessarily passed upon and rejected the federal constitutional issue thus raised.

Under the established doctrine of this Court, the federal question was timely raised even though the second motion for rehearing was summarily denied without reference to the federal question. See *Great*

Northern R. Co. v. *Sunburst Oil Co.*, 287 U.S. 358, 366-367; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-678; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U.S. 74, 79; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Saunders* v. *Shaw*, 244 U.S. 317, 320.

REASONS FOR GRANTING THE WRIT

This case raises an important federal constitutional issue which has never been passed upon or decided by this Court—whether the due process clause of the Fourteenth Amendment prohibits a state appellate court from arbitrarily withholding its review power to correct a plain deprivation of the right to a fair and impartial trial in a prosecution for murder.

Obviously, the Fourteenth Amendment is not so broad as to impose on state appellate courts an obligation to correct every inequity or error that may arise in the course of a felony prosecution. But when there has been a plain deprivation of the right to a fair and impartial trial by a fair and impartial jury and where the state appellate court refuses arbitrarily to exercise its discretionary power to correct so fundamental a defect, the question arises whether such a refusal is an act so arbitrary and so cruel in its operation, considering that life imprisonment is involved, that in the circumstances there has been a denial of due process in its rudimentary procedural aspect.

This Court has always recognized that the Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as to disregard fundamental fairness and in such a way as to prevent a fair trial. *Lyons* v. *Oklahoma*, 322 U.S. 596, 605. Denial of due process, as applied to a state

criminal trial, is the failure to observe that fundamental fairness essential to the very concept of justice. *Lisenba* v. *California,* 314 U.S. 219, 236. And so in this case such fundamental fairness has not been observed. There has been uncontroverted evidence by the members of the jury that they considered matters other than that received in evidence. More precisely, they considered the factors of parole and pardon in determining whether the petitioner's punishment should be assessed at life imprisonment or less. Texas courts have consistently held that consideration of such factors by the jury is improper and deprives the accused of his right to a fair and impartial trial, thereby entitling him to a new trial. *Spriggs* v. *State,* 268 S.W. 2d 191 (Tex. Cr. App.); *Price* v. *State,* 199 S.W. 2d 168 (Tex. Cr. App.); *Derrick* v. *State,* 187 S.W. 759 (Tex. Cr. App.); *Tutt* v. *State,* 91 S.W. 584 (Tex. Cr. App.); *McDougal* v. *State,* 194 S.W. 944 (Tex. Cr. App.).[4]

Thus when the Court of Criminal Appeals in this case held that such a fundamental defect could not be reviewed or corrected because the motion for a new trial had not been sworn to and was unaccompanied by affidavits by the jury members as to the misconduct, it was refusing to exercise its review power in a manner so arbitrary and cruel in its operation as to constitute a denial of due process in its rudimentary procedural aspect. As noted in the dissenting opinion

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[4] See also Section 7 of Article 753 of the Code of Criminal Procedure of Texas, requiring the granting of new trials in felony cases "Where the jury, after having retired to deliberate upon a case, have received other testimony . . ." Section 8 of Article 753 requires new trials "Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial."

(R. 157), there is no state statute which compels that result in this case. The requirements of verification and accompanying affidavits are solely the result of judicial interpretation. *Vowell* v. *State*, 244 S.W. 2d 214 (Tex. Cr. App.); *Fielden* v. *State*, 216 S.W. 2d 198 (Tex. Cr. App.); *Moore* v. *State*, 232 S.W. 2d 711 (Tex. Cr. App.). At the same time, it is clear that a trial court, in considering a motion for a new trial based on such jury misconduct, has discretionary power to overlook these judicially-imposed requirements and to entertain the motion on its merits despite the failure to fulfill the requirements. *Arsola* v. *State*, 133 S.W. 2d 585 (Tex. Cr. App.); *Hart* v. *State*, 17 S.W. 421 (Tex. Cr. App.). That is precisely what the trial court did in this case. It waived the necessity for verification of the amended motion for new trial and the requirement that affidavits accompany it. It treated the motion on its merits and received evidence pro and con.

Nothing in Texas statutory law compelled the Court of Criminal Appeals to decline to review the trial court's action in these circumstances. Nothing required it to insist upon strict observance by the trial court of the rules respecting verification and accompanying affidavits. Its refusal to review the case so as to correct the obvious error was a discretionary act, an arbitrary act that, in the words of the dissenting judge (R. 158), "is not only legally unsound but basically unfair." That unfairness is so basic, so offensive to our standards of justice, as to constitute a denial of due process of law within the meaning of the Fourteenth Amendment.

The question here is not one concerning the power of review lodged in the Court of Criminal Appeals.

Rather it is one concerning the exercise of a discretion vested in that court by the legislature of Texas, a discretion whereby it is free to review the action of the trial court and correct the deprivation of the right to a fair and impartial trial. Its arbitrary refusal to exercise that discretion in a case where the accused must suffer the penalty of life imprisonment is under the circumstances here present a denial of due process reviewable by this Court pursuant to its certiorari jurisdiction.

The constitutional issue raised by this case is a novel and important one that has not heretofore been the subject of this Court's consideration. It is one that deserves the fullest deliberation and resolution to the end that this petitioner shall not be made to suffer the penalty of life imprisonment by means of a state procedure that deprives him of the right to a fair and impartial trial by a fair and impartial jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Criminal Appeals of Texas should be granted.

Respectfully submitted,

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